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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY R. CLIPPER, Defendant and Appellant.	B278595 (Los Angeles County Super. Ct. No. MA066950)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kathleen Blanchard, Judge. Reversed.

Patricia S. Lai, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Zee Rodriguez and John Yang, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Anthony R. Clipper appeals from a judgment of conviction entered after a jury trial for three counts of attempting to dissuade a witness from prosecuting a crime, misdemeanor battery, and disobeying a court order. Clipper contends the trial court committed instructional error as to the elements of the charged offense of dissuading a witness in violation of Penal Code section 136.1, subdivision (b)(2),[1] and that the error was prejudicial. We agree and reverse Clipper's convictions on counts 3, 4, and 5.[2]

Because sufficient evidence was admitted at trial to support a conviction for attempting to dissuade a witness from prosecuting a crime, double jeopardy does not bar a retrial. We remand for a new trial on counts 3, 4, and 5.

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[1] All undesignated statutory references are to the Penal Code.

[2] Because we reverse based on instructional error, we do not reach Clipper's additional contentions that he was deprived of effective assistance of counsel; certain expert testimony was improperly admitted; use of a prior juvenile adjudication for purposes of sentencing under the three strikes law was improper; and punishment for two of his three convictions for attempting to dissuade a witness should have been stayed under section 654.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Information*[3]

An amended information charged Clipper with first degree residential burglary (§ 459; count 1); second degree burglary of vehicle (§ 459; count 2); three counts of dissuading a witness from prosecuting a crime (§ 136.1, subd. (b)(2); counts 3, 4, and 5); misdemeanor disobeying a court order (§ 166, subd. (a)(4); count 6); misdemeanor battery (§ 243, subd. (e)(1); count 7); and two counts of first degree burglary with a person present (§§ 459, 664; counts 8 and 9). As to each of counts 3, 4, and 5, the information alleged Clipper had "dissuad[ed] a witness from prosecuting a crime, in violation of Penal Code section 136.1(b)(2)," by "unlawfully attempt[ing] to prevent and dissuade Laurel Hawes, a victim and witness of a crime from causing a complaint, indictment, information, probation, and parole violation to be sought and prosecuted and assisting in the prosecution thereof" (capitalization omitted).

As to counts 1, 2, 3, 4, 5, 8, and 9, the information alleged Clipper suffered two prior convictions for serious or violent felonies, which constituted strikes within the meaning of the three strikes law (§§ 667, subds. (b)-(i), 1170.12), and were

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[3] Clipper was initially charged on October 13, 2015 with two counts of burglary in violation of section 459 in case No. MA066950. On January 11, 2016 the trial court consolidated that action with case No. MA067423, in which Clipper was charged with three counts of dissuading a witness from prosecuting a crime, one count of misdemeanor battery, and one count of disobeying a court order. On February 10, 2016 a consolidated information was filed, which was later amended.

serious felonies within the meaning of section 667, subdivision (a).

Clipper pleaded not guilty and denied the special allegations.

B. *The Evidence at Trial*

1. *The People's evidence*

a. *Clipper's entries into Hawes's home and vehicle*

Hawes testified she and Clipper had been in a relationship since 2010, and had two young children together. Hawes and Clipper lived together since 2011 in an apartment on 35th Street in Palmdale, California, although Clipper was never on the lease. In May 2015 their relationship was "shaky," due to Clipper's drug use. Hawes asked Clipper to leave to get sober. But Clipper came back to the apartment on a daily basis.

The trial court admitted into evidence audio recordings of phone calls made by Hawes to 911 on September 12 and 13, 2015. On September 12, 2015 at 10:32 p.m. Hawes called 911 and reported she came home to find her apartment had been broken into and her possessions were in disarray. While on the phone with 911, Hawes identified Clipper as the person who "broke in through [her] sliding door." Hawes saw Clipper leave the building. Hawes told the 911 operator Clipper did not have a key to the apartment.

At 3:15 a.m. the next morning Hawes again called 911 and reported Clipper was in the process of using a crowbar to break into her home through the balcony sliding door. However, he could not gain entry because Hawes had placed a stick in the door. At 6:23 a.m. the same day Hawes called 911 for a third time and reported Clipper was again attempting to enter her

home through the balcony sliding door using a crowbar. Hawes stated Clipper did not live in the apartment.

At 7:26 p.m. that evening Hawes called 911 and reported Clipper was in the apartment and had "barged in the door" when their daughter was coming into the apartment from the outside. Hawes had sprayed Clipper with pepper spray, and he left through the front door. When asked whether Clipper had a weapon, Hawes responded, "If anything, a crowbar—that's what he's been breaking into my house with." Hawes testified at trial she falsely told the police Clipper had a crowbar so the police "would get there faster" and "see [Clipper's] appearance with him being on drugs."

Video surveillance footage of the apartment complex from September 13, 2015 showed Clipper and Richard Young exiting Young's apartment in the same complex, then heading to Hawes's car. The video then showed a man attempting to pry open Hawes's car doors and trunk with an object, before breaking the driver's side window and unlocking the doors. The man then opened the trunk and removed a large duffel bag. The apartment building manager, Demis Gonzalez, identified Clipper as the man in the video breaking into Hawes's vehicle. Gonzalez also identified Young and Clipper in the video returning to Young's apartment after the break-in.

On the morning of September 14, 2015 Hawes found the driver's side window of her car was broken and there were pry marks on the trunk. A crowbar was lying on the back seat of the car. At about 1:20 p.m. that day sheriff deputies arrested Clipper at a field near Hawes's apartment. He had in his possession a bicycle and a duffel bag full of clothing.

On September 16, 2015 Hawes obtained a restraining order against Clipper. The parties stipulated Clipper was served the same day with a restraining order prohibiting him from contacting Hawes.

During a September 18, 2015 recorded interview with Los Angeles County Sheriff Detective Julia Vezina, Hawes stated on September 13 Clipper entered her apartment, grabbed her arm, and dragged her through the living room, causing a rug burn on her leg. Hawes then sprayed Clipper with the pepper spray.

b. *Clipper's calls to Hawes from jail*

Phone calls Clipper made to Hawes on September 19, 20, and 21, 2015 formed the factual basis for counts 3, 4, and 5. The audiotape of these calls, as well as calls Clipper made on September 23, 26, and 27, were admitted into evidence.

i. Count 3: Clipper's September 19 call to Hawes

On September 19, 2015 Clipper called Hawes from jail. Hawes told Clipper she intended to testify at his upcoming preliminary hearing. Hawes expressed fear that she would lose her children if she did not testify. She stated she had spoken with a social worker, and if she did not testify the authorities would send the Department of Children and Family Services "to see about taking [her] kids."

Clipper told Hawes he was facing a possible life sentence due to his criminal history. Hawes stated she never intended for Clipper to be in jail, but she wanted Clipper "away" from her and to get help. Clipper responded by telling Hawes she should testify that Clipper "did stay there," referring to the apartment,

but she did not want him there. Clipper noted if Hawes testified, she could be charged with a misdemeanor for filing a false police report saying he did not live there.

Clipper suggested Hawes invoke her Fifth Amendment right against self-incrimination to avoid being questioned at the hearing. Clipper added he would testify the front door was open and he never broke into the apartment. Hawes repeated her concern that her children could be taken away and told Clipper, "You're only looking out for yourself." Clipper responded that Hawes should either "plead the fifth" or explain she only temporarily wanted Clipper not to live at her apartment. Clipper emphasized he was "not telling [Hawes] not to come to court."

ii. Count 4: Clipper's September 20 call to Hawes

On September 20, 2015 Clipper again called Hawes from jail. Clipper told Hawes that while she had to go to court, "they cannot make [her] testify." Clipper coached Hawes if Clipper's attorney asked her whether Clipper lived with her, she should say "yeah, but [she] was trying to get [him] to get out of [her] house." Hawes responded she did not want to lose her housing for having allowed Clipper to live with her. Hawes said, "For me telling, under oath, that yes, you lived there, I could be evicted. That's what you['re] not understanding."

Clipper questioned Hawes about the events preceding his arrest, asking, "[W]hen you came home, I was in the house, right?" Hawes responded, "I don't think it's a good idea to be talking about this." Clipper explained he had used another inmate's booking number to place the call, so there would not be a problem.

Hawes challenged Clipper, "[Y]ou keep trying to put a guilt trip on me like I'm the one who did something." She added, "[Y]ou really want me to go up there and fucking lie is what you're saying." Clipper disagreed, "No, . . . I don't want you to lie."

Clipper and Hawes discussed that she was pregnant with Clipper's child. Clipper told Hawes he loved her and wanted to change his life. He said, "I miss you, but when I get out . . . [I'll do] whatever you want to do, how[ever] you want to decide it."

Clipper discussed sending his attorney to talk with Hawes. Hawes responded, "I don't know if he can because, because they say I'm a witness for them." Clipper then stated, "[W]hen I had that case with Teesha a while ago, . . . when she pled the fifth, like I said, they couldn't ask her no questions. They couldn't do nothing. . . . [T]hat's not saying that you're telling the truth, or that's not saying that you['re] lying." Hawes responded, "Basically what it's saying is I don't want to say nothing that would incriminate [me] [¶] . . . I know what plead the fifth is." Clipper continued, "[T]hat being said, my case can get dismissed. You feel me? My case will be dismissed . . . ." Clipper added, "[T]hey [are] going to need the victim to back up the police report [by] saying[,] okay, yes this is true."

Hawes told Clipper he should do some amount of time for the damage he had done to her car. Clipper responded, "Giving these motherfuckers time . . . ain't going to make the situation happy," but if he were released, Clipper could help pay for the car repairs. If Hawes pleaded the fifth, "they can't get you for lying . . . . And it [can] get my case dismissed because . . . I have the right to cross-examine . . . my accuser. You feel what I'm saying?" Clipper continued, "So truly, honestly, . . . that's like the

best thing to do. Just say . . . I plead the fifth, my Fifth Amendment right. . . . You feel me?" Hawes responded with skepticism, "Of course you're going to tell me . . . whatever the fuck you want me to say! Like you say your life is on the line."

Clipper told Hawes that if she invoked her Fifth Amendment right, she could "have a public defender too." Clipper then described how Hawes would go about invoking her Fifth Amendment right when called to testify at the upcoming preliminary hearing. "Tell the judge like, 'Your honor, I'd like to plead the fifth.' . . . [T]he DA [is] going to be mad because . . . he [w]on't have no case now."

iii. Count 5: Clipper's September 21 call to Hawes

On September 21, 2015 Clipper called Hawes from jail, again using another inmate's booking number. Hawes told Clipper she had talked to her father about whether she would be entitled to her own lawyer for the preliminary hearing. Hawes expressed distrust for the police and fear about child services becoming involved with her children, stating, "I don't want a case open on me period." Clipper responded, "And that's why I told you to plead the fifth." Hawes agreed, "I mean I'm going to have to 'cause whatever I say is going to incriminate myself." Hawes explained that she had told the police "[a]t first . . . that [Clipper] never lived there." Hawes told Clipper she said he didn't live there because the police were "asking [Hawes] in front of the [apartment] manager." Clipper reiterated, "So if you don't want to incriminate yourself, all you got to do is just say I plead the fifth."

Hawes told Clipper he should stop calling for this purpose. Clipper reassured Hawes he was using another inmate's booking number, so the call would not be traceable to him.

iv. Clipper's additional jail calls

On September 23, 2015 Clipper spoke with his father and Hawes by phone. During the call, Clipper discussed a conversation he had with his lawyer in which Clipper asked what would happen if Hawes did not testify. Clipper's father responded, "They'll postpone it to see and try to talk to her again." Clipper agreed, then added, "But see they can only hold me up until my 60th day for trial, because a police report can't go to trial. You feel me?"

On September 26 Clipper again spoke with Hawes by phone. Hawes indicated she did not think she was going to testify at the preliminary hearing. Clipper again counseled Hawes to invoke the Fifth Amendment. Clipper said, "[I]f they try to make you take the stand, be like, 'Shit, I don't want to take the stand, I plea[d] the [fifth]."

On September 27 Clipper called Hawes once more. This time Clipper told Hawes to testify at the preliminary hearing that she had given him permission to go into her car to get his bags. Hawes declined, saying that was "not what [she] was doing."

c. *The September 28, 2015 preliminary hearing*

Hawes spoke with Detective Vezina on the day of the preliminary hearing. Hawes explained that after she had made her initial reports to the police, she discovered the lock on her front door was broken, so Clipper could not have forcibly entered

the apartment. Hawes also stated she had found an electronic device that she previously believed Clipper had stolen. Hawes added Clipper had not taken any of her possessions from the car. Hawes then asked Detective Vezina for an attorney. An alternate public defender was appointed to represent Hawes. At the preliminary hearing, Hawes invoked her Fifth Amendment right against self-incrimination, and did not testify.

d. *Detective Vezina's testimony and evidence of Clipper's prior prosecution*

Detective Vezina testified she had reviewed the audio tapes of Clipper's phone calls to Hawes from jail. Detective Vezina opined based on her experience with domestic violence victims and suspects that Clipper "wanted [Hawes] to plead the [Fifth] Amendment so that she could not testify against him. And as he pointed out to her he has the right to confront his accuser. Therefore, if he can't confront his accuser he thought the case would be dismissed. In order to convince her . . . he made an emotional connection with her. . . . He promised her . . . if he were able to get out that things would be different. That he would get a job. That he would do the program that she wanted him to do. . . . [H]e's trying to break her down to accomplish his goal of having her cease her cooperation with any prosecution and refuse to testify against him."

Detective Vezina also testified Clipper made some of his calls from jail using other inmates' booking numbers. She explained that using another inmate's booking number to place a call was "one of the ways that the suspect will use to attempt to contact somebody that they don't want law enforcement to know about. . . . [T]hey will attempt to use somebody else's booking

number in order to contact people and make statements that they do not want us law enforcement to hear."

The court admitted a certified court docket in case No. MA041932, in which Clipper was a named defendant. The document indicated a witness named Leticia Scott had asserted her Fifth Amendment right not to testify.

2. *The defense case*

Clipper called Ralph Bennett, an investigator for the Los Angeles County Public Defender's office, as his sole witness. Bennett testified he visited Hawes's home on October 2 and 5, 2015. Hawes showed Bennett items in the apartment she stated belonged to Clipper. Bennett took photographs of the items, which were admitted into evidence. Bennett also observed the locking mechanism on Hawes's front door did not work properly, rendering the latch easy to open.

C. *Jury Instructions, Closing Arguments, and the Verdict*

As relevant here, the jury was instructed with CALJIC No. 7.14: "Defendant is accused in Counts 3, 4, and 5 of having violated section 136.1, subdivision (b)(2) of the Penal Code, a crime. [¶] Every person who knowingly and maliciously prevents or dissuades, or attempts to prevent or dissuade, any witness or victim from: [¶] A. Attending or giving testimony at any trial, proceeding, or inquiry authorized by law, [¶] B. Making any report of such victimization to any peace officer, state or local law enforcement officer, probation, parole or correctional officer, any prosecution agency or to any judge, or [¶] C. Causing a complaint, indictment, information, probation or parole violation to be sought and prosecuted, and from assisting in the

prosecution thereof, is guilty of a violation of Penal Code section 136.1, subdivision (b)(2), a crime."

The jury was given verdict forms for counts 3, 4, and 5 that included only the charged offenses of "dissuading a witness from prosecuting a crime" under section 136.1, subdivision (b)(2).

During his closing argument, the prosecutor discussed and quoted from the jail call transcripts at length. He argued Clipper made "these jail calls to try to convince [Hawes] to plead the [fifth] because in his previous case his previous ex-girlfriend pled the [fifth] and his case got dismissed. He's trying to game the system. He's trying to take the power away from you as jurors." The prosecutor highlighted the elements of the crime as read to the jury, noting the People needed to show Clipper had the specific intent to prevent or dissuade or attempt to prevent or dissuade "Hawes from any of these three things."

The prosecutor then reviewed the three ways under the jury instruction Clipper could be found guilty on counts 3, 4, and 5. First, he would be guilty if he had the specific intent to prevent or dissuade Hawes from "[a]ttending or giving testimony at any trial, proceeding or inquiry." "[I]f he's telling her to plead the [fifth], that prevents her from actually giving testimony. Therefore, any time he tells her to plead the [fifth] he's telling her or attempting to tell her not to give testimony at a proceeding."

Second, the prosecutor argued Clipper would be guilty of dissuading a witness if he intended to prevent or dissuade Hawes from "[m]aking a report of [her] victimization to any police officer." But the prosecutor acknowledged, "this one we don't have as much except for the fact . . . Hawes doesn't report the fact additional items were stolen."

Third, the prosecutor explained Clipper could also be guilty upon a finding he "attempt[ed] to dissuade or prevent [Hawes] from assisting with the prosecution of this case. When a case is filed we have a complaint. And at the point when the complaint goes to a preliminary hearing, a hearing in which evidence is heard, after it's past the hearing we have an information . . . . He . . . attempted to . . . dissuade her from assisting and prosecuting this case. . . . [W]e know he did because he's planting testimony. He's telling her not to say certain things and he's telling her to plead the [fifth] so she doesn't testify at all."

During his closing argument, defense counsel argued it was "speculation to say just because [Clipper] was facing criminal charges that his only concern was getting out," rather than concern over Hawes "perjuring herself on the stand about having [lied] initially about the case."

After closing arguments, the trial court further instructed the jury: "The defendant is accused of having committed the crime of dissuading a witness in counts 3, 4, and 5 . . . . The prosecution has introduced evidence for the purpose of showing that there is more than one act upon which a conviction on counts 3, 4, [and] 5 . . . may be based. [¶] [I]n order to reach a verdict of guilty . . . all jurors must agree that he committed the same act or acts constituting that crime."

The jury acquitted Clipper on the four burglary counts (1, 2, 8, and 9). As to counts 3, 4, and 5, the jury found Clipper "guilty of the crime of dissuading a witness from prosecuting a crime . . . [by] unlawfully attempt[ing] to prevent and dissuade Laurel Hawes, a victim of a crime from causing a complaint, indictment or information to be sought or prosecuted or assisting in the prosecution thereof, in violation of Penal Code Section

136.1(b)(2), a Felony, as charged in . . . the Information." The jury also found Clipper guilty of disobeying a court order (count 6) and misdemeanor battery (count 7).

D. *Bench Trial on Alleged Prior Convictions*

The trial court bifurcated the trial on the alleged prior convictions. Clipper waived his right to a jury trial. The trial court found the allegations Clipper suffered two prior felony convictions for robbery in 1999 and 2003 to be true, and found both qualified as strikes under the three strikes law. The court granted the People's motion to dismiss the serious felony enhancement under section 667, subdivision (a), as to Clipper's 1999 juvenile adjudication. The court granted Clipper's *Romero*[4] motion to strike the 1999 juvenile strike prior as to counts 4 and 5, but denied the motion as to count 3.

E. *Sentencing*

The trial court sentenced Clipper on count 3 to an indeterminate term of 25 years to life under the three strikes law (§§ 667, subds. (b)-(i), 1170.12). The trial court selected count 4 as the base determinate term and imposed the upper term of three years, doubled as a second strike, for a total of six years. On count 5, the trial court imposed a consecutive term of eight months (one-third the middle term of two years), doubled as a second strike, plus an additional five years under section 667, subdivision (a)(1), for a total of six years four months. On counts 6 and 7, the trial court sentenced Clipper to 180-day county jail terms, but stayed the sentence on count 6 pursuant to section

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[4] *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497.

654, and ordered the sentence on count 7 to run concurrent with the term imposed on count 4.

The trial court sentenced Clipper to an aggregate term of 25 years to life and 12 years four months. Clipper timely appealed.

DISCUSSION

A. *The Trial Court's Instructional Error on Counts 3, 4, and 5 Requires Reversal*

Clipper contends the trial court erred in instructing the jury on counts 3, 4, and 5 that Clipper could be found guilty of violating section 136.1, subdivision (b)(2), by preventing or dissuading or attempting to prevent or dissuade a victim from giving testimony at a trial or other proceeding (a violation of § 136.1, subds. (a)(1), (2), respectively) or attempting to prevent or dissuade a victim from reporting a crime (a violation of § 136.1, subd. (b)(1)), although Clipper was not charged with those crimes. We agree, and find the error was prejudicial.

1. *The trial court erroneously instructed the jury on the elements of section 136.1, subdivision (b)(2)*

"Section 136.1 basically prohibits four forms of witness intimidation. In subdivision (a), it forbids knowingly and maliciously preventing or dissuading a witness or victim from attending or testifying at trial. Subdivision (b) prohibits preventing or dissuading a witness or victim from (1) reporting the victimization [subdivision (b)(1)]; (2) causing a complaint or similar charge to be sought [subdivision (b)(2)]; and (3) arresting or causing or seeking the arrest of any person in connection with

such victimization [subdivision (b)(3)]."[5] (*People v. Hallock* (1989) 208 Cal.App.3d 595, 606 (*Hallock)*; accord, *People v. Torres* (2011) 198 Cal.App.4th 1131, 1137-1138 ["section 136.1 defines a family of 20 related offenses," including five underlying crimes that are punishable as misdemeanors or as felonies under four sets of circumstances].) Each form of prohibited witness intimidation has its own distinct elements. (*People v. Velazquez* (2011) 201 Cal.App.4th 219, 229-230 (*Velazquez*) [upholding conviction of § 136.1, subd. (b)(2), for threats to witness to persuade her to drop charges, distinguishing crime of witness intimidation under § 136.1, subd. (b)(1), which criminalizes pre-arrest attempts to

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[5] Section 136.1 reads: "(a) Except as provided in subdivision (c), any person who does any of the following is guilty of a public offense and shall be punished by imprisonment in a county jail for not more than one year or in the state prison: [¶] (1) Knowingly and maliciously prevents or dissuades any witness or victim from attending or giving testimony at any trial, proceeding, or inquiry authorized by law. [¶] (2) Knowingly and maliciously attempts to prevent or dissuade any witness or victim from attending or giving testimony at any trial, proceeding, or inquiry authorized by law. [¶] . . . [¶] (b) Except as provided in subdivision (c), every person who attempts to prevent or dissuade another person who has been the victim of a crime or who is witness to a crime from doing any of the following is guilty of a public offense and shall be punished by imprisonment in a county jail for not more than one year or in the state prison: [¶] (1) Making any report of that victimization to any peace officer or state or local law enforcement officer or probation or parole or correctional officer or prosecuting agency or to any judge. [¶] (2) Causing a complaint, indictment, information, probation or parole violation to be sought and prosecuted, and assisting in the prosecution thereof. [¶] (3) Arresting or causing or seeking the arrest of any person in connection with that victimization."

dissuade a victim from reporting a crime]; *People v. Fernandez* (2003) 106 Cal.App.4th 943, 949 (*Fernandez*) [reversing conviction under § 136.1, subd. (b)(1), for dissuading a victim from reporting a crime, where defendant's conduct in influencing witness's testimony at hearing violated § 137, subd. (c), but not charged § 136.1 offense]; *Hallock*, at p. 607 [reversing conviction of § 136.1, subd. (b)(1), for attempting to dissuade victim from reporting a crime where the jury was instructed on uncharged violation of § 136.1, subd. (a), for dissuading a victim from attending or testifying at trial].)

Here, the trial court instructed the jury with CALJIC No. 7.14 on three separate crimes: the charged crime under section 136.1, subdivision (b)(2), for attempting to prevent or dissuade a witness from prosecuting a crime, as well as the crimes of witness intimidation under subdivisions (a)(1) and (a)(2) for preventing or dissuading or attempting to prevent or dissuade a victim from attending or testifying at trial, and subdivision (b)(1) for attempting to prevent or dissuade a witness from reporting a crime. Yet Clipper was charged only with the crime of witness intimidation under subdivision (b)(2). Further, the jury only found Clipper guilty of a violation of subdivision (b)(2), which was the only crime listed on the jury forms for counts 3, 4, and 5.

The trial court had no jurisdiction to enter a judgment of conviction for violation of section 136.1, subdivision (a)(1), (a)(2), or (b)(1), for which Clipper was not charged. "'It is fundamental that "[w]hen a defendant pleads not guilty, the court lacks jurisdiction to convict him of an offense that is neither charged

nor necessarily included in the alleged crime.'"'"[6] (*People v. Arias* (2010) 182 Cal.App.4th 1009, 1019 [reversing enhanced sentence for attempted first-degree murders where prosecution failed to plead offenses were willful, deliberate, and premeditated]; accord, *In re Fernando C.* (2014) 227 Cal.App.4th 499, 502-503 [reversing judgment after juvenile adjudication for fighting in public place where prosecution charged only the separate offense of fighting on school grounds, which was not a "public place" under statutory scheme].) Moreover, the jury found Clipper guilty of violating section 136.1, subdivision (b)(2), not subdivision (a)(1), (a)(2), or (b)(1).

The People contend the trial court did not err in instructing the jury because the information was informally amended to include charges under section 136.1, subdivisions (a) and (b)(1), in addition to the charge under subdivision (b)(2), because Clipper impliedly consented to an amendment to the charges by not objecting to the jury instruction. Thus, the People contend, the jury could have found Clipper guilty of a violation of section 136.1, subdivision (a), (b)(1), or (b)(2).[7]

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[6] The People do not contend section 136.1, subdivisions (a) and (b)(1) are lesser included offenses of subdivision (b)(2).

[7] Although Clipper did not object to the trial court's proposed instructions under CALJIC No. 7.14, he has not forfeited this issue on appeal because the error potentially affects his substantial rights. (§ 1259 ["The appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby"]; *People v. Gutierrez* (2018) 20 Cal.App.5th 847, 856, fn. 8 ["when an instruction allegedly affects the substantial rights of the defendant, it is reviewable even in the absence of an objection"];

The People's reliance for this proposition on *People v. Toro* (1989) 47 Cal.3d 966, disapproved on another ground by *People v. Guiuan* (1998) 18 Cal.4th 558, is misplaced. In *Toro*, the defendant was charged with attempted murder and assault with a deadly weapon. (*Toro,* at p. 970.) The jury was instructed on, and received verdict forms for, the charged offenses, as well as for battery with serious bodily injury. (*Id.* at p. 971.) The Supreme Court upheld the defendant's conviction of battery with serious bodily injury, reasoning, "There is no difference in principle between adding a new offense at trial by amending the information," which is permissible, "and adding the same charge by verdict forms and jury instructions." (*Id.* at p. 976, fn. omitted.)

Toro is distinguishable in that the jury in that case returned a verdict for the uncharged crime. Here, even if Clipper's failure to object to the instruction constituted an amendment to the information to charge Clipper with violations of section 136.1, subdivisions (a) and (b)(1), the jury found Clipper guilty for violating subdivision (b)(2). Thus, any amendment to the information would not cure the instructional error where the jury convicted Clipper of a violation of section 136.1, subdivision (b)(2), but was instructed on the elements of a violation of subdivisions (a) and (b)(1).

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see *People v. Hudson* (2006) 38 Cal.4th 1002, 1011-1012 [a defendant's failure to object to a jury instruction does not result in forfeiture on appeal when the instruction contains an incorrect statement of the law].)

2. *Clipper was prejudiced by the instructional error*

"Instructional error regarding the elements of the offense requires reversal of the judgment unless the reviewing court concludes beyond a reasonable doubt that the error did not contribute to the verdict." (*People v. Chun* (2009) 45 Cal.4th 1172, 1201, 1205 [second degree felony murder instruction was erroneous where underlying felony was assaultive, but error was not prejudicial where "no juror could find felony murder without also finding conscious-disregard-for-life malice"]; accord, *In re Martinez* (2017) 3 Cal.5th 1216, 1224 [once petitioner "has shown that the jury was instructed on correct and incorrect theories of liability, the presumption is that the error affected the judgment"]; *People v. Chiu* (2014) 59 Cal.4th 155, 167 [reversing first degree murder conviction based on instructional error where court could not conclude "beyond a reasonable doubt that the jury based its verdict on the legally valid theory"]; *People v. Stutelberg* (2018) 29 Cal.App.5th 314, 318 [explaining as to trial court's erroneous instruction on definition of a deadly weapon, "the instructional error in this case is legal in nature, and we therefore employ the traditional *Chapman* standard to evaluate prejudice. (*Chapman v. California* (1967) 386 U.S. 18)"].)

Clipper contends the trial court's instructional error was prejudicial because the evidence he violated subdivision (a) by attempting to dissuade Hawes from testifying at the preliminary hearing was stronger than the evidence he attempted to dissuade Hawes from causing an information to be sought because the jail calls showed he wanted Hawes to invoke her Fifth Amendment right to avoid prosecution for filing a false police report.

The People contend even if Clipper's conduct did not violate section 136.1, subdivision (b)(2), the verdict should be upheld

because "there is a strong 'basis in the record to find that the verdict was actually based' on conduct specified in section 136.1, subdivision (a)(1) and (a)(2)." In making this argument, the People rely on the holding in *People v. Guiton* (1993) 4 Cal.4th 1116 (*Guiton*) that "if there are two possible grounds for the jury's verdict, one unreasonable and the other reasonable, we will assume, absent a contrary indication in the record, that the jury based its verdict on the reasonable ground." (*Id.* at p. 1127.)

Guiton is inapposite. There, the question was whether the trial court's error in instructing the jury on two theories of the charged crime, selling or transporting a controlled substance, was harmless error where there was insufficient evidence the defendant sold the cocaine at issue. (*Guiton, supra*, 4 Cal.4th at p. 1121.) The court concluded that although the trial court's instruction that the jury could convict the defendant of selling cocaine was error, "[t]he record does not affirmatively demonstrate a reasonable probability that the jury found the defendant guilty solely on the sale theory." (*Id.* at p. 1131.)[8] Unlike *Guiton*, even if the jury could have convicted Clipper of a violation of section 136.1, subdivision (a)(1) or (2), he was not charged with or convicted of those crimes.

We therefore consider whether the evidence supported Clipper's conviction for the uncharged crimes under section 136.1, subdivisions (a) and (b)(1). The crimes of dissuading a witness enumerated in section 136.1 require proof of specific intent.

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[8] Because the error in instructing the jury on a legally valid theory that was not supported by the evidence did not constitute a federal constitutional error, the court applied a harmless error analysis under *People v. Watson* (1956) 46 Cal.2d 818, 836. (*Guiton, supra*, 4 Cal.4th at p. 1130.)

(*People v. Wahidi* (2013) 222 Cal.App.4th 802, 806 ["The crime of attempting to dissuade a witness from testifying [in violation of § 136.1, subd. (a)(2),] is a specific intent crime."]; *Velazquez, supra*, 201 Cal.App.4th at pp. 229-230 [§ 136.1, subd. (b)(2), requires proof of specific intent].)

Clipper's intent in urging Hawes to invoke her Fifth Amendment right against self-incrimination was in dispute at trial. In his closing argument the prosecutor argued Clipper could be convicted for dissuading Hawes not to testify at the preliminary hearing, regardless of his reason for doing so. He argued, "[I]f he's telling her to plead the [fifth], that prevents her from actually giving testimony. Therefore, any time he tells her to plead the [fifth] he's telling her or attempting to tell her not to give testimony at a proceeding."

Defense counsel posited Clipper was motivated by a genuine concern about Hawes's liability for making false statements during her initial reports to the authorities. Clipper's jail calls to Hawes supported this assertion. For example, Hawes testified she falsely told the police she had seen Clipper use a crowbar so that the police "would get there faster" and "see [Clipper's] appearance with him being on drugs." During the September 20, 2015 jail call with Clipper, Hawes articulated her concern about testifying "under oath, that yes, [Clipper] lived there," referring to Hawes's apartment, "[because] I could be evicted." During the September 21 call, in which Hawes first seriously entertained the idea of invoking the Fifth Amendment, she stated "whatever I say is going to incriminate myself" because she had told the police "[a]t first . . . that [Clipper] never lived" with her in her apartment. Clipper responded, "So if you

don't want to incriminate yourself, all you got to do is just say I plead the fifth."

If the jury believed Hawes's testimony, it could have found Clipper's conduct in urging Hawes to invoke the Fifth Amendment was motivated by a desire that Hawes avoid prosecution for filing a false police report. This would have violated section 136.1, subdivision (a)(2), for "[k]nowingly and maliciously attempting to prevent or dissuade" Hawes "from attending or giving testimony" at the preliminary hearing, but not subdivision (b)(2), for "attempting to prevent or dissuade" Hawes from "[c]ausing a complaint, indictment, information, probation or parole violation to be sought and prosecuted, and assisting in the prosecution thereof."[9]

Because the jury could reasonably have concluded the evidence supported a conviction of Clipper for the uncharged crime of dissuading or attempting to dissuade Hawes from testifying at the preliminary hearing, in violation of section 136.1, subdivision (a)(2), we conclude the instructional error was prejudicial because we cannot "conclude[] beyond a reasonable doubt that the error did not contribute to the verdict." (*People v. Chun, supra*, 45 Cal.4th at p. 1201.)

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[9] Although there was also evidence that Clipper was urging Hawes not to testify so the charges against him would be dismissed, we cannot conclude beyond a reasonable doubt that the jury convicted Clipper on this theory of witness intimidation.

B. *Substantial Evidence Supports Clipper's Conviction Under Section 136.1, Subdivision (b)(2)*

Clipper contends retrial is barred because the evidence was insufficient to support his conviction under section 136.1, subdivision (b)(2). We disagree.

"'[A]n appellate ruling of legal insufficiency is functionally equivalent to an acquittal and precludes a retrial.'" (*People v. Story* (2009) 45 Cal.4th 1282, 1295; accord, *People v. Jones* (2018) 26 Cal.App.5th 420, 443, fn. 15.) "'"[T]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a *reasonable trier of fact* could find the defendant guilty beyond a reasonable doubt."'" (*People v. Ghobrial* (2018) 5 Cal.5th 250, 277; accord, *People v. Mora and Rangel* (2018) 5 Cal.5th 442, 488 ["Although we assess whether the evidence is inherently credible and of solid value, we must also view the evidence in the light most favorable to the jury verdict and presume the existence of every fact that the jury could reasonably have deduced from that evidence."].)

The audio recordings of the jail calls between Clipper and Hawes contain repeated instances of Clipper encouraging Hawes to invoke her Fifth Amendment right against self-incrimination in the context of his case being dismissed. For example, Clipper stated as part of his proposal that Hawes invoke the Fifth Amendment, "My case will be dismissed . . . ." Clipper then added, "[T]hey [are] going to need the victim to back up the police report . . . ." In the end, Hawes invoked her Fifth Amendment right and did not testify. In addition, the prosecution introduced

evidence that in a prior case against Clipper a witness invoked her Fifth Amendment right against self-incrimination.

Clipper argues this evidence is insufficient to support his conviction under section 136.1, subdivision (b)(2), because he only sought to dissuade Hawes from testifying at a judicial proceeding, conduct punishable under subdivision (a), not (b)(2). Clipper relies on dicta in *Fernandez,* that subdivision (b)(2) criminalizes only "efforts to dissuade a victim or witness from acts other than testifying in court." (*Fernandez, supra*, 106 Cal.App.4th at p. 950.) But *Fernandez* was not about the breadth of subdivision (b)(2); rather, the question there was whether the defendant was properly charged under subdivision (b)(1) with dissuading a crime victim from "[m]aking any report of that victimization . . . to any judge" where the evidence showed the defendant had attempted to influence the content of the victim's testimony, a separate crime under section 137. (*Id.* at p. 947.) The court reasoned a "report" to a judge did not include providing testimony in court, explaining, "Common usage of the word 'report' does not support the People's interpretation of section 136.1, subdivision (b)(1), even if preliminary hearing testimony would literally fall within the definition of 'report' as 'an account presented.'" (*Id.* at p. 948.) Other courts have similarly concluded the broad language in *Fernandez* regarding interpretation of subdivision (b)(2) was dictum. (See *Velazquez, supra*, 201 Cal.App.4th at pp. 232-233 ["To the extent the court in *Fernandez* intended to include subdivision (b)(2) in its statement that subdivision (b) applies only to prearrest attempts to dissuade the reporting of a crime, the statement is dictum, with which we respectfully disagree."]; *People v. Brown* (2016) 6 Cal.App.5th 1074, 1083-

1084 (*Brown*) ["There was simply no issue before the court [in *Fernandez*] concerning section 136.1, subdivision (b)(2)."].)

Whether a defendant's conduct in dissuading a witness from testifying at the preliminary hearing with the intent to prevent an information from being filed violates section 136.1, subdivision (b)(2), is a matter of statutory construction. """As in any case involving statutory interpretation, our fundamental task here is to determine the Legislature's intent so as to effectuate the law's purpose." [Citation.] We begin by examining the statutory language because the words of a statute are generally the most reliable indicator of legislative intent. [Citations.] We give the words of the statute their ordinary and usual meaning and view them in their statutory context. [Citation.] We harmonize the various parts of the enactment by considering them in the context of the statutory framework as a whole. [Citations.] "If the statute's text evinces an unmistakable plain meaning, we need go no further." [Citations.]' "'Ultimately we choose the construction that comports most closely with the apparent intent of the lawmakers, with a view to promoting rather than defeating the general purpose of the statute.'"" (*1550 Laurel Owner's Association, Inc. v. Appellate Division of Superior Court of Los Angeles County* (2018) 28 Cal.App.5th 1146, 1151; accord, *Shorts v. Superior Court* (2018) 24 Cal.App.5th 709, 720.)

Here, the statutory language covers Clipper's conduct because section 136.1, subdivision (b)(2), criminalizes conduct by a defendant with the specific intent to dissuade or attempt to dissuade a victim from "[c]ausing a complaint, indictment, information, probation or parole violation to be sought and prosecuted, and assisting in the prosecution thereof." At the time

of Clipper's calls from jail, a complaint had been filed against him, but not an information. Therefore, to the extent Clipper's conduct encouraged Hawes to cause the information not to be filed, it fell within the plain language of section 136.1, subdivision (b)(2).

Clipper contends the appellate courts have only read section 136.1, subdivision (b)(2), to include conduct where a defendant persuades a victim to drop criminal charges or recant the version of events told to the police, citing to *Velazquez, supra*, 201 Cal.App.4th at pp. 232-233 and *Brown, supra*, 6 Cal.App.5th at p. 1084, respectively. But this does not mean subdivision (b)(2) does not apply to other conduct, including dissuading a witness from testifying at a hearing. We conclude that it does.

The Court of Appeal's analysis in *Brown* is instructive. In *Brown*, after a victim reported to the police the defendant had vandalized her car, the defendant threatened her that he would "take [her] life" unless she contacted the police and recanted. (*Brown*, *supra*, 6 Cal.App.5th at p. 1076.) The defendant contended on appeal he was erroneously convicted based on this conduct for attempting to dissuade the victim from "causing a complaint . . . to be sought and prosecuted, and assisting in the prosecution thereof," in violation of subdivision 136.1, subdivision (c)(1).[10] (*Id.* at pp. 1076, 1079.) He argued he should have instead been convicted, if at all, under the more specific statute,

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[10] Section 136.1, subdivision (c)(1), "increases the penalty for preventing prosecution [under §136.1, subd. (b)(2)]—and for any other violation of section 136.1—when committed 'knowingly and maliciously' and 'accompanied by force or by an express or implied threat of force or violence.'" (*Brown, supra*, 6 Cal.App.5th at p. 1079.)

section 137, subdivision (c), which prohibits "'knowingly induc[ing] another person . . . to give false material information pertaining to a crime to . . . a law enforcement official.'" (*Id.* at p. 1080.)

Analyzing the relationship between the two provisions, the court considered whether "'(1)"each element of the general statute corresponds to an element on the face of the special statute" or (2) [whether] "it appears from the statutory context that a violation of the special statute will *necessarily or commonly* result in a violation of the general statute."'" (*Brown, supra*, 6 Cal.App.5th at pp. 1080-1081.) Proceeding under this framework, the court rejected defendant's argument, noting that "[n]ot every element of section 136.1, subdivision (b)(2) corresponds to an element of section 137, subdivision (c)," and there were circumstances in which a violation of section 137, subdivision (c), would not violate section 136.1, subdivision (b)(2). (*Id.* at p. 1081.) The court explained, for example, that section 136.1, subdivision (b)(2), applied to conduct "regardless of whether the witness is prevented or dissuaded from appearing, or merely prevented or dissuaded from speaking the truth—or both." (*Id.* at p. 1083.) Thus, a violation of section 136.1, subdivision (b)(2), would not "commonly" result in a violation of section 137, subdivision (c). (*Ibid.*)

Similarly, section 136.1, subdivisions (a) and (b)(2), have distinct elements, such that a violation of one is not necessarily a violation of the other. Subdivision (b)(2) is temporally limited in that the conduct must precede the issuance of the relevant document, in this case an information. By contrast, subdivision (a) reaches efforts to prevent or dissuade any witness from giving testimony in any judicial proceeding, up to and including trial.

Further, subdivision (a) applies to efforts to dissuade a witness from testifying, regardless of whether that testimony would prevent the prosecution. Conversely, a defendant may violate subdivision (b)(2) by means other than encouraging a witness not to provide testimony. Thus, a defendant urging a victim not to testify will not "commonly" result in a violation of (b)(2) and vice versa.

A reasonable jury could find Clipper intended through his conduct to cause Hawes—by not testifying at the preliminary hearing—to prevent an information from issuing against him and to fail to assist in the prosecution of the alleged burglary offenses. There was therefore substantial evidence to support Clipper's conviction under section 136.1, subdivision (b)(2), and we remand for a new trial.

DISPOSITION

We reverse Clipper's conviction as to counts 3, 4, and 5 under section 136.1, subdivision (b)(2), and remand for a new trial.

FEUER, J.

WE CONCUR:

ZELON, Acting P. J. SEGAL, J.